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| <b>DEPARTMENTAL REGULATION</b>                               |   | Number:<br>3450-002 |
| SUBJECT: Freedom of Information Act Implementing Regulations | DATE:<br>October 7, 1986                                    |                     |
|  | OPI: Special Programs Division, Office of Information, OGPA |                     |

1 PURPOSE

These regulations establish Departmentwide policy, procedures, requirements, and responsibilities for administration and coordination of the Freedom of Information Act (FOIA), pursuant to which official records may be obtained by any person.

2 OBJECTIVE

The overall significance of these regulations is to provide assistance to the public in accessing information in Department files, provide guidance to agencies in processing and responding to FOIA requests and appeals, and to promote consistency among agencies in permitting public access. These regulations also set forth guidance on how the FOIA is implemented in the Office of the Secretary and in the Office of Governmental and Public Affairs, as required under a provision that each agency publish implementing regulations. The Department's final FOIA Implementing Regulations (7 CFR Part 1, Subpart A) were published in the FEDERAL REGISTER on September 10, 1986 (51 FR 32189) and are attached.

3 RESPONSIBILITY

Each agency should review its existing FOIA implementing regulations (required under section 1.3 of the attached), and make any necessary revisions. All revised agency implementing regulations should be published in the FEDERAL REGISTER. Each agency should forward a copy of the revised published regulations to the FOIA Officers, Office of Governmental and Public Affairs, Office of Information, within 30 days after publication.

Please see hard copy or contact OIRM, IMD on 202-447-8799 for the paper copy of the following image(s):

ATTACHMENT

FEDERAL REGISTER

## DEPARTMENT OF AGRICULTURE

Office of the Secretary

## 7 CFR Part 1

## Freedom of Information Act Implementing Regulations

AGENCY: Office of the Secretary, USDA.

ACTION: Final rule.

SUMMARY: This notice sets forth the revisions to the Department of Agriculture's regulations (7 CFR Part 1, Subpart A) implementing the Freedom of Information Act (FOIA). The regulations as proposed were published in the Federal Register on March 6, 1986, at 51 FR 7799.

The revisions to those regulations are the result of comments received in the Department during the public comment period and are intended to simplify and clarify the Department's guidelines for assisting the public in accessing information, promoting consistency in obtaining access, rendering additional assistance to Department agencies, establishing clear-cut business notification procedures, and assessing product and service fees. The "SUPPLEMENTARY INFORMATION" below provides a detailed explanation of the revisions.

DATE: The regulations become effective October 10, 1986.

FOR FURTHER INFORMATION CONTACT: Milton Sloane, U.S. Department of Agriculture, Office of Governmental and Public Affairs, Office of Information, Special Programs Division, Washington, DC 20250; (202) 447-8164.

SUPPLEMENTARY INFORMATION: This rule does not constitute a "major rule" within the meaning of Executive Order No. 12291 (Improving Government Regulations) nor will these regulations cause a significant economic impact or other substantial effect on small entities. Therefore, the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., do not apply.

## I. Analysis of Comments

A total of six comments was postmarked or received within the comment period as extended. Comments were received from the following:

- ) Law offices of McGrath, North, O'Malley & Krantz, P.C.
- ) Law offices of Preston, Ellis & Holman
- ) Forest Service, USDA
- ) Office of Governmental and Public Affairs, USDA
- ) National Forest Products Association
- ) Law offices of Saltman & Stevens, P.C.

Comments requesting an extension of time for the public comment period which was scheduled to expire on April 7, 1986, were also received from the National Forest Products Association and the law firm of Saltman & Stevens, P.C. By notice in the Federal Register (51 FR 11930, dated April 8, 1986), the initial comment period was extended to April 21, 1986. Following is an analysis of the comments.

1. Agency implementing regulations (proposed 1.3). One commenter suggested that each USDA agency be required to write its implementing regulations in a manner promoting uniformity both within and among Department agencies. The commenter also suggested that 1.3 include a review system by which the Assistant General Counsel would review each agency's regulations before they become final.

As a matter of course, currently, all notices or regulations destined for publication in the Federal Register and which outline agency policy and procedures are reviewed by the Office of the General Counsel, as well as by other Department agencies. Turning to the commenter's first suggestion, the Department notes that very essence of 1.3 (indeed, of the entire regulations) is to foster uniformity requiring publication of standardized information regarding the locations and operating hours of offices where individuals may access agency records, by the titles and mailing addresses of officials responsible for acting on initial requests and appeals, the officials responsible for making discretionary releases of information, as well as other data for accessing information.

2. Public access to certain materials (proposed 1.5). One commenter suggested that 1.5 be amended to set forth guideline on what is and is not releasable under the FOIA.

The Department believes the FOIA quite clearly establishes the parameters for the types of data which may or may not be released under the Act, and which effectively standardize the manner in which agencies must operate. Further, since many exempt documents may be released by agency discretion, it would be inappropriate to denominate "non-releasable" documents. It is, therefore, this Department's decision that 1.5 stand as proposed, and that requesters pursue existing procedures in accessing USDA documents.

3. Requests for records (proposed 1.6(h)). One commenter suggested that the phrase "and address" be deleted from this section on the basis that the information would increase some agencies' workload and would lead to an unwarranted invasion of personal privacy.

While there is some disagreement with that argument, 1.6(h) has been amended by the deletion of the phrase "and address" for the benefit of agencies not wishing or needing that information.

4. Agency response to requests for records (proposed 1.7). One commenter suggested that adding a new 1.7(g) to indicate that "where a requester has previously failed to pay a fee charged under this part, the requester must pay the agency the full amount owed and make an advance deposit of the estimated fee before an agency shall be required to process a new request or a pending request form that requester."

Rather than add a whole new section as suggested, the Department has amended proposed 1.7(d) to incorporate the commenter's suggestion. The second sentence of 1.7(d) is amended to read: "It may, in accordance with Appendix A of this subpart, require payment of the entire fee, or a portion thereof, or full payment of a delinquent fee, before it provides the requested records."

5. Handling information from a private business (proposed 1.8). Generating the most comments on the proposed regulations was this section on the business notification process. These comments generally suggested that the proposed notification procedure be made mandatory and be expanded to include all requests for such information regardless of the ability of the Department to "readily determine" whether to release the information.

Careful consideration was given to each comment and the comments as a whole. The Department has decided to change the notification procedures from a discretionary procedure to a mandatory one in

certain cases. The Department has decided to retain the ability not to notify submitters of information of FOIA requests when it is readily determined that the information either should not be disclosed or should be released. While the overall policy of the Department is to notify the submitters of such requests and to seek their views, it is the responsibility of the Department under the FOIA to make the final determination with regard to the disclosure or nondisclosure of information submitted by a business. Therefore, in those circumstances where the Department has no doubts as to the nature of the determination it is obliged to make under the law, the notification procedures to submitters will remain discretionary. Specific comments follow:

(a) One commenter suggested amending 1.8(a) to require an agency to notify a business of, and allow the business to respond to, any request for business information generated by and agency.

Under the regulations as proposed, agencies would only have to give notice in cases where business information is submitted to an agency. The commenter's suggestion would require notice for business information generated by an agency. Given the language of the FOIA, and existing case law, the Department has decided to limit the business notification process strictly to information submitted to an agency.

(b) One commenter suggested that 1.8 be expanded to require agencies to notify submitters of business data of any request for information that:

(1) The submitter has specifically designated as confidential; or

(2) Was submitted to the agency under compulsion of a statute, regulation, or contract; or

(3) The government has assured it will hold in confidence; or

(4) Is subject to a statutory, regulatory, or contractual requirement of reasonable notice to the submitter prior to its disclosure.

As stated above, the Department has decided not to adopt the suggestions to expand the notification procedures. It is the USDA view that the mandatory provisions of 1.8 supply ample protection to the business information submitter. All the factors covered by the suggestion would be considered in the agency review of the information when deciding whether a ready determination not to disclose or to release could be made.

(c) One commenter requested that USDA "obtain and consider the views of the submitter of business information, as well as provide an opportunity to object, even in cases where the agency believes it can readily make a determination as to the disclosure or nondisclosure of information."

The comment refers to 1.8(a)(1). The Department has determined that such a system would be unduly burdensome in instances where the decision to release or not to disclose may be "readily determined." Business information submitters should not interpret "readily determined" as indicating any laxity in the decisionmaking process or any failure to consider potential harm to submitters' positions.

(d) One commenter suggested that 1.8(a) be amended to read: "Where the USDA receives a request for information submitted by a business, all agencies of the Department should:

(1) Provide the business information submitter with prompt notification of the request. Afford the submitter time in which to present its views and any objections to the request prior to the agency decisions;

(2) Notify the requester of the need to inform the submitter of the request for submitted business information and of the submitter's appeal process;

(3) After making a final determination to disclose, notwithstanding the objection of the submitter, provide the business information submitter notification of what the agency intends to disclose, and a ten (10) day period prior to any actual disclosure within which it may take any additional efforts to protect its data from disclosure."

The mandatory provisions of 1.8 already cover these suggestions, with the exceptions that not every request will require notification of submitters and time limits for notifications are not specified. The decision not to notify submitters of every request is discussed in comments (b) and (c) above. The decision not to specify time limits is based upon the lack of any authorized extensions in the FOIA for notifying submitters. The commenter's suggestions were not incorporated.

(e) One commenter requested that the word "should" in 1.8(a) be changed to "shall" to make it mandatory for agencies to perform the tasks set out in 1.8(a)(1) through 1.8(a)(5).

Section 1.8(a) is so amended, despite the fact that the provisions under 1.8 are not statutorily mandated.

(f) One commenter requested that 1.8(a)(1) be amended to require agencies to notify business data submitters of a request for information which at the time of submission was identified as sensitive or confidential.

As noted in the response to comment (b), above, confidentially markings would be considered in the agency review of the information when deciding whether a ready determination not to disclose or to release could be made.

(g) One commenter suggested that the phrase "privileged and confidential", in 1.8(a) be changed to "privileged or confidential."

Section 1.8(a) is so amended. Use of the conjunction "or" is consistent with the test of exemption in 5 U.S.C. 552(b)(4).

(h) Two commenters suggested that the proposed test in 1.8(a)(1) as to when an agency need not notify submitters of requests for submitted data be changed from "readily determined" to "clearly apparent."

The Department believes that a standard of "readily determined" is more appropriate for an agency decision regarding the release or nondisclosure of documents, than is a standard of "clearly apparent." The standard will remain unchanged.

6. Compulsory process (proposed 1.18). One commenter requested that agencies notify a business information submitter of any compulsion or demand (subpoena, order, or other compulsory process) for that information, whether or not the government is a party to litigation seeking disclosure.

In keeping with the provisions of 1.8 of this subpart, that section is amended by adding the following after the word "request" in the third sentence of 1.8(a): "(including any "demand" as defined in 1.18)". This will make clearer that USDA agencies are required to follow the provisions of 1.8 when a 1.18 "demand" is made for business submitted information.

7. General photographic reproduction prices (proposed 15(b), Appendix A). One commenter suggested deleting the second sentence which read: "All sizes are approximate." The commenter also noted that a portion of the fee schedule printed in this proposed section was incorrect. The commenter submitted a list of corrected rates for inclusion in these final regulations.

The sentence referred to has been deleted, and the revised rates have adopted.

## II. Other Change

One other change has been made in the proposed regulations:

- ) The room number for the Photography Division in proposed section 10(b) Appendix A has been changed. The new room number is 4407 South Building.

### List of Subjects in 7 CFR Part 1

#### Freedom of Information

7 CFR Part 1, Subpart A is revised to read as follows:

#### PART 1-ADMINISTRATIVE REGULATIONS

##### Subpart A-Official Records

##### Sec.

1.1 Purpose and scope.

1.2 Policy.

1.3 Agency implementing regulations.

1.4 Implementing regulations for the Office of the Secretary.

1.5 Public access to certain materials.

1.6 Requests for records.

1.7 Agency response to requests for records.

1.8 Handling information from a private business.

1.9 Date of receipt of requests or appeals.

1.10 Appeals

1.11 Extension of administrative deadlines.

1.12 Failure to meet administrative deadlines.

1.13 Fee schedule.

1.14 Exemptions and discretionary release.

1.15 Annual report.

1.16 Compilation of new records.

1.17 Authentication.

1.18 Compulsory process.

1.19 Records in formal adjudication proceedings.

#### Appendix A-Fee Schedule

Authority: 5 U.S.C. 301 and 522, Appendix A also issued under 7 U.S.C. 2244; 31 U.S.C. 9701, and 7 CFR 2.75(a)(6)(xiii).

#### Subpart A-Official Records

##### 1.1 Purpose and Scope.

This subpart establishes policy, procedures, requirements, and responsibilities for administration and coordination of the Freedom of Information Act (FOIA), 5 U.S.C. 552, pursuant to which official records may be obtained by any person. It also provides rules pertaining to the disclosure of records pursuant to compulsory process. This subpart also serves as the implementing regulations (referred to in 1.3, "Agency implementing regulations") for the Office of the Secretary, the immediate offices of the Secretary, Deputy Secretary, Under Secretaries and Assistant Secretaries) and for the Office of Governmental and Public Affairs. The Office of Governmental and Public Affairs has the primary administrative responsibility for the FOIA in the Department of Agriculture (USDA). The term "agency" or "agencies" is used throughout this subpart to include both USDA program agencies and staff offices.

##### 1.2 Policy

(a) Agencies of USDA shall comply with the time limits set forth in the FOIA for responding to and processing requests and appeals for agency documents, unless there are exceptional circumstances within the meaning of 5 U.S.C. 552(a)(6)(B). An agency shall notify a requester whenever it is unable to respond to or process a request or appeal within the time limits established by the FOIA.

(b) All agencies of the Department shall comply with the fee schedule provided as Appendix A of this regulation, with regard to the charging of fees for providing copies of documents and related services to requesters.

##### 1.3 Agency implementing regulations.

(a) Each agency of the Department shall promulgate regulations setting forth the following:

(1) The location and hours of operation of the agency office or offices where members of the public may gain access to those materials required by 1.5 to be made available for public inspection and copying.

(2) Information regarding the publications and distribution (by sale or otherwise of indexes and supplements thereto which are maintained in accordance with the requirements of 5 U.S.C. 552(a)(2) and 1.5(b).

(b) The title(s) and mailing address(es) of the official (s) of the agency who is/are authorized to receive requests for records submitted in accordance with 1.6(a), and to make determinations regarding whether to grant or deny such requests. Authority to make such determinations includes authority to:

- (1) Extend the 10-day administrative deadline for reply pursuant to 1.11;
- (2) Make discretionary releases pursuant to 1.14(b); and
- (3) Make determinations regarding the charging fee pursuant to Appendix A of this subpart.

(c) The title and mailing address of the official of the agency who is authorized to receive appeals from denials of requests for records submitted in accordance with 1.16(e) and to make determinations regarding whether to grant or deny such appeals. Authority to determine appeals includes authority to:

- (1) Extend the 20-day administrative deadline for reply pursuant to 1.11 (to the extent the maximum extension authorized by 1.11(c) was not used with regard to the initial request);
  - (2) Make discretionary releases pursuant to 1.14(b); and
  - (3) Make determinations regarding the charging of fees pursuant to Appendix A of this subpart.
- (d) Other information which would be of concern to a person wishing to request records from that agency in accordance with this subpart.

#### 1.4 Implementing regulations for the Office of the Secretary.

For the Office of the Secretary and for the Office of Governmental and Public Affairs, the information required by 1.3 is as follows:

- (a) Records available for public inspection and copying may be obtained in Room 547-A, Administrative Building, USDA, Washington, DC 20250 during the hours of 8:45 a.m. to 5:15 p.m.
- (b) Any indexes and supplements which are maintained in accordance with the requirements of 5 U.S.C. 552(a)(2) and 1.5(b) will also be available in Room 547-A, Administrative Building, USDA, Washington, DC 20250 during the hours of 8:45 a.m. to 5:15 p.m.
- (c) The person authorized to receive FOIA requests and to determine whether to grant or deny such requests is the Director of Information, Office of Governmental and Public Affairs, USDA, Washington, DC 20250
- (d) The official authorized to receive appeals from denials of FOIA requests and to determine whether to grant or deny such appeals is the Deputy Assistant Secretary for Governmental and Public Affairs, USDA, Washington, DC 20250.

#### 1.5 Public access to certain materials.

- (a) In accordance with 5 U.S.C. 552(a)(2), each agency within the Department shall make the following materials available for public inspection and copying (unless they are published and copies offered for sale):



- (1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
  - (2) Those statements of policy and interpretation which have been adopted by the agency and are not published in the Federal Register; and
  - (3) Administrative staff manuals and instructions to staff that affect a member of the public.
- (b) Each agency of the Department shall also maintain and make available current indexes providing identifying information regarding any matter issued, adopted, or promulgated after July 4, 1967, and required by paragraph (a) of this section to be made available or published. Each agency shall publish and make available for distribution copies of such indexes and supplements thereto at least quarterly, unless it determines by Notice published in the Federal Register that publication would be unnecessary and impracticable. After issuance of such Notice, the agency shall provide copies of any index upon request at a cost not to exceed the direct cost of duplication.

#### 1.6 Request for records.

- (a) Any person who wishes to inspect or obtain copies of any record of any agency of the Department shall submit a request in writing and address the request to the official designated in regulations promulgated by the agency. The requester may in his or her petition ask for a fee waiver if there is likely to be a charge for the requested information. To inspect or obtain copies of records of the Office of the Secretary or the Office of Governmental and Public Affairs, requesters should submit their requests to the Director of Information, Office of Governmental and Public Affairs, U.S. Department of Agriculture, Washington, DC 20250. All such requests for records shall be deemed to have been made pursuant to the Freedom of Information Act, regardless of whether that Act is specifically mentioned. To facilitate processing of a request, the phrase "FOIA REQUEST" should be placed in capital letters on the front of the envelope.
- (b) A request must reasonably describe the records to enable agency personnel to locate them with reasonable effort. Where possible, a requester should supply specific information regarding dates, title, etc., which may help identify the records. If the request relates to a matter in pending litigation, the court and its location should be identified.
- (c) If an agency determines that a request does not reasonably describe the records, it shall inform the requester of this fact and extend the requester an opportunity to clarify the request or to confer promptly with knowledgeable agency personnel to attempt to identify the records he or she is seeking. The "date of receipt" in such instances, for purposes of 1.9(a), shall be the date of receipt of the amended or clarified request.
- (d) Nothing in this subpart shall be interpreted to preclude an agency from honoring an oral request for information, but, if the requester is dissatisfied with the response, the agency official involved shall advise the requester to submit a written request in accordance with paragraph (a) of this section. The "date of receipt" of such a request for purposes of 1.9(a) shall be the date of receipt of the written request. For recordkeeping purposes, an agency responding to an oral request for information may ask the requester to also submit his or her request in writing.
- (e) If a request for records made under this subpart is denied, the person making the request shall have the right to appeal the denial. This appeal must be in writing and addressed to the official designated in regulations promulgated by the agency which denied the request. To facilitate processing of an appeal, the phrase "FOIA APPEAL" should be placed in capital letters on the front of the envelope.
- (f) Requests that are nonagency-specific, i.e., are not addressed to a specific agency in USDA, or which pertain to more than one USDA agency or which are sent to the wrong agency of USDA,

should be forwarded to the Department's central processing unit for FOIA in the Office of Governmental and Public Affairs, Office of Information, Special Programs Division, U.S. Department of Agriculture, Washington, DC 20250.

(g) The central processing unit will determine which agency or agencies should process the request, and, where necessary, refer the request to the appropriate agency (agencies). The unit will also notify the requester of the referral and of the name each agency to which the request has been referred.

(h) Each agency shall develop and maintain a record of all written and oral requests and appeals received in that agency, which shall include, in addition to any other information, the name of the requester, brief summary of the information requested, an indication of whether the request or appeal was denied or partially denied, the exemption(s) for making any denials, and the amount of fees associated with the request or appeal.

#### 1.7 Agency response to request for records.

(a) 5 U.S.C. 552(a)(6)(A)(i) provides that each agency of the Department to which a request for records or a fee waiver is submitted in accordance with 1.6(a) shall inform the requester of its determination concerning that request within 10 days of its date of receipt (excepting Saturdays, Sundays, and legal public holidays), plus any extension authorized under 1.11. If the agency determines to grant the request, it shall inform the requester of any conditions surrounding the granting of the request (e.g., payment of fees) and the approximate date upon which compliance will be effected. If it grants only a portion of the request, it shall treat the portion not granted as a denial. If the agency determines to deny the request in part or in whole, it shall immediately inform the requester of that decision and of the following:

- (1) The reasons for the denial;
- (2) The name and title or position of each person responsible for denial of the request;
- (3) The requester's right to appeal such denial and the title and address of the official to whom such appeal is to be addressed; and
- (4) The requirement that such appeal be made within 45 days of the date of the denial.

(b) If the reason for not fulfilling a request is that the records requested are in the custody of another agency outside USDA, the agency shall inform the requester of this fact and shall forward the request to that agency or Department for processing in accordance with its regulations. If the agency has no knowledge of requested records or if no records exist, the agency shall notify the requester of that fact.

(c) 5 U.S.C. 552(a)(6)(A)(ii) provides that each agency in the Department to which appeal of a denial is submitted in accordance with 1.6(e) shall inform the requester of its determination concerning that appeal within 20 days (excepting Saturdays, Sundays, and legal public holidays), plus any extension authorized by 1.11, of its date of receipt. If the agency determines to grant the appeal, it shall inform the requester of any conditions surrounding the granting of the request (e.g., payment of fees) and the approximate date upon which compliance will be effected. If it grants only a portion of the appeal, it shall treat the portion not granted as a denial. If it determines to deny the appeal either in part or in whole, it shall inform the requester of that decision and of the following:

- (1) The reasons for denial;
- (2) The name and title or position of each person responsible for denial of the appeal; and
- (3) The right to judicial review of the denial in accordance with 5 U.S.C. 552(a)(4).

(d) If in compliance with the request a charge is to be made in accordance with Appendix A of this subpart, the agency's response shall inform the requester of the amount and basis for the charge. It may, in accordance with Appendix A of this subpart, require payment of the entire fee, or a portion thereof, or full payments of a delinquent fee before it provides the requested records. In instances where a requester refuses to remit payment in advance, an agency may likewise refuse to process the request with written notice to that effect forwarded to the requester. The "date of receipt" of a request for which advance payment has been required shall be the date that payment is received.

(e) In the event compliance with the request involves inspection of records by the requester rather than the forwarding of copies, the agency response shall include the name, mailing address, and telephone number of the person to be contacted to arrange a mutually convenient time for such inspection.

(f) In the event the records requested contain some portions which

are exempt from mandatory disclosure and others which are not, the official responding to the request shall insure that all nonexempt portions are disclosed, and that all exempt portions are identified according to the nature of information contained and the specific exemption or exemptions which are applicable.

#### 1.8 Handling information from a private business.

(a) The USDA is responsible for making the final determination with regard to the disclosure or nondisclosure of information submitted by a business. When, in the course of responding to and FOIA request, an agency cannot readily determine whether the information obtained from a person is privileged or confidential business information, the policy of USDA is to obtain and consider the views of the submitter of the information and to provide the submitter an opportunity to object to any decision to disclose the information. Whenever a request (including any "demand" as defined in 1.18) is received in USDA for information which has been submitted by a business, all agencies of the Department shall:

(1) Provide the business information submitted with prompt notification of a request for that information (unless it is readily determined by the agency that the information requested should not be disclosed or, on the other hand, that the information is not exempt by law from disclosure).

(2) Notify the requester of the need to inform the submitter of a request for submitted business information.

(3) Afford business information submitters time in which to object to the disclosure of any specified portion of the information. The submitter must explain fully all grounds upon which disclosure is opposed. For example, if the submitter maintains that disclosure is likely to cause substantial harm to its competitive position, the submitter must explain item-by-item why disclosure would cause such harm. Information provided by a business submitter pursuant to this paragraph may itself be subject to disclosure under FOIA.

(4) Provide business information submitters with notice of any determination to disclose such records prior to the disclosure date, in order that the matter may be considered for possible judicial intervention.

(5) Notify business information submitters promptly of all instances in which FOIA requesters bring suit seeking to compel disclosure of submitted information.

#### 1.9 Date of receipt of requests or appeals.

(a) The date of receipt of a requests or appeal, which contains the phrase FOIA REQUESTS or FOIA APPEAL and is addressed in accordance with applicable agency regulations, shall be the date it is received in the office responsible for the administrative processing of FOIA requests or appeals.

(b) The date of receipt of a request or appeal which is hand-delivered to the address specified in agency regulations shall be the date of such hand-delivery.

(c) The date of receipt of a request or appeal which does not comply with paragraphs (a) or (b) of this section shall be the date it is received by the official designated in agency regulations to make the applicable determination.

#### 1.10 Appeals.

(a) Each agency shall provide for review of appeals by an official different from the official or officials designated to make initial denials.

(b) Each agency, upon a determination that it wishes to deny an appeal, shall send a copy of the records requested and of all correspondence relating to the request to the Assistant General Counsel, Research and Operations Division, Office of the General Counsel. When the volume of records is so large as to make sending a copy impracticable, the agency shall enclose an informative summary of those records. The agency shall not deny an appeal until it receives concurrence from the Assistant General Counsel.

(c) The Assistant General Counsel shall promptly review the matter (including necessary consultation with the Department of Justice and coordination with the Office of Governmental and Public Affairs) and render all necessary assistance to enable the agency to respond to the appeal within the administrative deadline or any extension thereof.

#### 1.11 Extension of administrative deadlines.

(a) In unusual circumstances as specified in this section, either of the administrative deadlines prescribed in 1.7 may be extended by an authorized agency official. Written notice of the extension shall be sent to the requester within the applicable deadline, setting forth the reasons for such extension and the date a determination is expected to be dispatched. In no event shall the extension exceed a total of 10 working days.

(b) As used in this section, "unusual circumstances" shall be limited to the following:

(1) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; and

(3) The need for consultation, which shall be conducted with all practicable speed, with another Department or agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(Note: consultation regarding policy or legal issues between an agency and the Office of the General Counsel, Office of Governmental and Public Affairs, or the Department of Justice is not a basis for extension under this section.)

(c) The 10-day extension authorized by this section may be divided between the initial and appellate review, but in no event shall the total extension exceed 10 working days.

(d) Nothing in this section shall preclude the agency and the requester from agreeing to an extension of time. Any such agreement shall be confirmed in writing and shall specify clearly the total time agreed upon.

1.12 Failure to meet administrative deadlines.

In the event an agency fails to meet either of the administrative deadlines set forth in 1.7, plus any extension authorized by 1.11, it shall notify the requester, state the reasons for the delay, and the date by which it expects to dispatch a determination. Although the requester may be deemed to have exhausted his or her administrative remedies under 5 U.S.C. 552(a)(6)(C), the agency shall continue processing the request as expeditiously as possible and dispatch the determination when it is reached in the same manner and form as if it had been reached within the applicable deadline.

1.13 Fee schedule.

Pursuant to authority delegated in 2.75 of this title, the Director, Office of Finance and Management, has issued regulations, following notice and public comment, setting forth a uniform schedule of fees applicable to all agencies of the Department regarding requests for records under this subpart. (See Appendix A of this subpart.) Any amendments thereto will be made by the Director pursuant to notice and opportunity for comment. Said regulations provide reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such duplication. The regulations provide that documents may be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

1.14 Exemptions and discretionary release.

(a) All agency records, except those specifically exempted from mandatory disclosure by one or more provisions of 5 U.S.C. 552(b), shall be made promptly available to any person submitting a request under this subpart.

(b) Except where disclosure is specifically prohibited by Executive Order, statute, or applicable regulations, an agency may release records exempt from mandatory disclosure under 5 U.S.C. 552(b) whenever it determines that such disclosure would be in the public interest.

1.15 Annual report.

(a) Each agency of the Department shall compile the following information for each calendar year:

(1) The number of determinations made by such agency not to comply with initial requests for records made to it under 1.6(a), and the reasons for each such determination;

(2) The number of appeals made by persons under 1.7(d), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) The name and title or position of each person responsible for the denial of records requested under this subpart and the number of instances of participation for each;

(4) The results of each proceeding conducted pursuant to 5 U.S.C. 552(a)(4)(F), including a report of the disciplinary action taken against the office or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) A copy of every rule made by the agency regarding this subpart;

(6) The total amount of fees collected by the agency for making records available under this subpart; and

(7) Such other information as indicates efforts to administer fully this subpart.

(b) Each agency shall compile the information required by paragraph (a) of this section for the preceding calendar year into a report and submit this report to the Director of Information, Office of Governmental and Public Affairs, by February 1 of each year.

(c) The Director of Information shall combine the reports from the various agencies within USDA into a Departmental report, and shall arrange for submission of this report to the President of the Senate and the Speaker of the House of Representatives by March 1 of each year in accordance with 5 U.S.C. 552(d).

#### 1.16 Compilation of new records.

Nothing in 5 U.S.C. 552 or this subpart requires that any agency compile a new record in order to fulfill a request for records. Such compilation may be undertaken voluntarily if the agency determines this action to be in the public interest.

#### 1.17 Authentication;

When a request is received for an authenticated copy of a document which the agency determines to make available to the requesting party, the agency shall cause a correct copy to be prepared and sent to the Office of the General Counsel which shall certify the same and cause the seal of the Department to be affixed, except that the Hearing Clerk may authenticate copies of documents in the records of the Hearing Clerk.

#### 1.18 Compulsory process.

(a)(1) In any case where it is sought by subpoena, order, or other compulsory process (hereinafter in this section referred to as a "demand") to require the production or disclosure of any record or material which is exempt from disclosure under 5 U.S.C. 552(b) or information related thereto acquired by an employee of this Department in the performance of his or her official duties, the matter shall be referred to an official authorized by agency regulations to make releases pursuant to 1.14(b) For the Office of the Secretary and for the Office of Governmental and Public Affairs, this official is the Deputy Assistant Secretary for Governmental and Public Affairs.

(2) Such official may authorize release. However, if such official determines that it would be improper to comply with the demand, the official shall refer it to the agency head. The agency head may authorize release; however, if the agency head concurs with the initial conclusion, the matter shall be referred to the Secretary through the General Counsel for final determination.

(3) If the Secretary determines that the records, materials, or information should not be produced, or if no final determination has been made, the employee shall be notified not to produce or disclose the records. The employee who appears in answer to the demand shall respectfully decline to produce or disclose the records, material, or information demanded on the ground that the disclosure is

prohibited by this section. The employee shall provide the court or other authority with a copy of this subpart and a copy (when available) of the Secretary's determination, and shall respectfully request the court or other authority to withdraw or stay the demand.

(b)(1) Whenever a demand of the type described in paragraph (a) of this section is made upon an employee of this Department not authorized to make releases pursuant to of 1.14(b), by a court or other authority while he/she is appearing before, or is otherwise in the presence of the court or other authority, the employee, or other appropriate Government official or attorney acting on behalf of the employee, shall (i) immediately inform the court or other authority that this section prohibits the employee from producing or disclosing the information or material demanded and (ii) offer to refer the demand for the prompt consideration of authorized officials, providing the court or other authority a copy of this subpart and respectfully requesting that the demand be stayed pending his/her receipt of appropriate instructions concerning the demand.

(2) If the employee is authorized to make a release pursuant to of 1.14(b), but determines that such release would be improper, the employee shall offer to refer the demand for the prompt consideration of the agency head and/or Secretary and shall otherwise comply with paragraph (b)(1)(ii) of this section.

(c) If the court or other authority declines to stay the effect of the demand in response to a request made in accordance with paragraphs (a) or (b) of this section pending the receipt by the employee of instruction or directions, or if the court or other authority rules adversely on any assertion made in conformity with the provisions of this subpart, the employee upon whom the demand has been made may tender the records, material, or information demanded with a request they be held in camera until an appeal can be taken from the adverse ruling.

#### 1.19 Records in formal adjudication proceedings.

Records in formal adjudication proceedings are on file in the Hearing Clerk's office, Office of Information Resources Management, U.S. Department of Agriculture, Washington, DC 20250, and shall be made available to the public.

#### Appendix A--Fee Schedule

Sec. 1. General. This schedule sets forth fees to be charged for providing copies of records, including photographic copies of reproductions, microfilm, maps and mosaics, and related services. The fees set forth in this schedule are applicable to all agencies of the Department of Agriculture.

Sec. 2. Facilities. Records and related services are available at the locations specified by the agencies in their statements of procedures to facilitate public inspection and copying of their records. Any material offered for sale by the Government Printing Office should be purchased from that source. Departmental agencies will not stock such material for public sale. Agencies do not stock copies or forms and publications or maintain records at any facility which does not require these materials in its operations.

Sec. 3. Fees for materials and services. All agencies of the Department shall comply with the fees set forth herein. Any changes or additions to this fee schedule shall be made by amendment to the revision of this schedule.

#### Sec. 4. Fees for records and related services.

a. The fee for photocopies of 8 1/2" x 14" or smaller shall be \$0.10 for the first copy and \$0.10 for each additional copy of the same page.

b. The fee for photocopies larger than 8 1/2" x 14" shall be \$0.25 per linear foot of the longest side of the copy.

c. Manual searches will be charged for at the rate of \$8.00 per hour for clerical time and \$14.60 per hour for supervisory or professional time. Charges will be computed to the nearest quarter hour required for the search. A search may involve both clerical and supervisory or professional time.

d. Other direct costs incurred will be assessed the requester at the actual cost to the Government, e.g., where records are required to be shipped from one office to another by commercial carrier in order to timely answer the request, the actual freight charge will be assessed the requester.

e. Computer services will be charged for at the rates established in the Users Manual or Handbook published by the computer center at which the work will be performed, except that where commercial time-sharing computer sources are the required search media, the contract rate charged by the commercial source to the Government will be charged. A listing follows showing where those rates are published and the office from which copies may be obtained or at which the rates may be examined.

Fort Collins Computer Center Users Manual:

Fort Collins Computer Center, U.S.  
Department of Agriculture, 3825 East  
Mulberry Street (P.O. Box 1206), Fort  
Collins , Colo. 80521.

National Finance Center, Cost, Productivity & Analysis Section,

U.S. Department of Agriculture, 13800 Old Gentilly Road, New  
Orleans, La. 70129.

Kansas City Computer Center Users Manual:

Kansas City Computer Center, U.S.  
Department of Agriculture, 8930 Ward  
Parkway (P.O. Box 205), Kansas City, Mo.  
64141.

Washington Computer Center Users

Handbook: Washington Computer Center,  
U.S. Department of Agriculture, Room S-  
100, South Building, 12th Street and Independence Avenue,



S.W., Washington, D.C. 20250.

St. Louis Computer Center. Charges for the St. Louis Computer Center will be based on actual expenses incurred in performing the search. Address is: St. Louis Computer Center, U.S. Department of Agriculture, 1520 Market Street, St. Louis, Mo 63103.

f. The fees do not include, and no charge shall be made for, (a) time spent examining records to determine whether an exemption can and should be asserted, (b) time spent deleting exempt matter being withheld from records to be furnished, (c) time spent in resolving legal or policy issues, or (d) time spent in monitoring a requester's inspection of agency records.

g. The fee for Certifications shall be \$2.00 each: Authentications under Department Seal (including aerial photographs), \$5.00 each.

h. Except as provided in Section 9 below, for services not subject to the Freedom of Information Act and not covered by (g) above, agencies may set their own fees in accordance with applicable law.

i. The fees specified in paragraphs a through f of this Section apply to all requests for services under the Freedom of Information Act, as amended (5 U.S.C. 552), unless no fee is to be charged, or the agency has determined to waive or reduce those fees pursuant to Section 5. No higher fees nor charges in addition to those provided for in this schedule may be charged a party requesting search or duplication services under the Freedom of Information Act.

j. The fees specified in paragraphs g and h of this Section and in Section 9 through 15 of this schedule apply to requests for services other than those subject to the Freedom of Information Act. The authority for establishment of these fees is at 31 U.S.C. 9701 (formerly 31 U.S.C. 483a) and other applicable laws.

Sec. 5. Circumstances governing exceptions to the charging of fees for records and related services. (For photographic reproductions, see Sec. 11 of this Appendix.)

a. Waiver of fees for records and related services. Fees may be waived in whole or in part under the following conditions:

- (1) Where individual collections are \$25.00 or less;
- (2) Where the furnishing of the service without charge is an appropriate courtesy to a foreign country or international organization, or comparable fees are set on a reciprocal basis with a foreign country or an international organization;
- (3) Where the recipient is engaged in a nonprofit activity designed for the public safety, health, or welfare;
- (4) Where the agency determines that payment of the full fee by a State, local government, or nonprofit group would not be in the interest of the program involved;
- (5) When the furnishing of records and related services is determined by the agency to be in the public interest as primarily benefiting the general public.
- (6) In determining whether a fee waiver is appropriate for purposes of paragraph (a)(5) of this Section, an agency should consider the following factors:

- (i) Whether there is a genuine public interest in the subject matter of the documents for which a fee waiver or reduction is sought;
  - (ii) The value to the public of the records themselves;
  - (iii) Whether the requested information is already available in the public domain;
  - (iv) The requester's specific qualifications, nature of research, and the purposes for which the requested materials will be used (the identity of a requester is usually not a proper factor to consider in granting or denying access, but should be considered in acting on a request for a fee waiver);
  - (v) The amount of personal benefit expected to accrue to the requester as the result of disclosure, compared with any discernible public benefit (FOIA fee waiver or reduction is appropriate only where the benefit to the general public is primary).
- (7) An agency may, at its discretion, waive or reduce fees associated with a request for disclosure regardless of whether a waiver or reduction has been requested if the agency determines that disclosure will primarily benefit the general public.

b. Fees not to be charged for records and related services. Documents shall be furnished without charge under the following conditions:

- (1) When filling requests from other Departments or Government agencies for official use, provided quantities requested are reasonable in number;
- (2) When members of the public provide their own copying equipment, in which case no copying fee will be charged (although search fees may still be assessed);
- (3) When any notices, decisions, orders, or other materials are required by law to be served on a party in any proceedings or matter before any Department agency.

c. Where both paragraphs a and b above apply to a matter, paragraph b shall be controlling.

#### Sec. 6. Limitations of copies.

a. Agencies may restrict numbers of photocopies and directives furnished the public to one copy of each page. Copies of forms provided to the public shall also be held to the minimum practical. Persons requiring any large quantities should be encouraged to take single copies to commercial sources for further appropriate reproduction.

b. Single or multiple copies of transcripts, provided by the Department under a reporting service contract, may be obtained from the contractor at a cost not to exceed the cost per page charged to the Department for extra copies. The contractor may add a postage charge when mailing orders to the public but no other charge may be added.

#### Sec. 7. Search services.

a. Search services are services of agency personnel-clerical, supervisory, or professional salary level-used in trying to find the records sought by the requester. They include time spent examining records for the purpose of finding records which are within the scope of the request. They also include

services to transport personnel to places of record storage, or records to the location of personnel for the purpose of the search, if such services are reasonably necessary.

b. Because of the nature of the Department's business and records, the normal location of a record in a file or other facility will not be considered a search. This would be the same as quickly locating a piece of material for purposes of answering a letter or telephone inquiry, and is based on the Department's obligation to respond to requests furnishing a reasonably specific description of the record.

#### Sec. 8. Payments of fees and charges.

a. Payments will be collected to the fullest extent possible in advance or at the time the requested material are furnished.

b. Payment shall be made by check, draft, or money order payable to the Treasury of the United States, but small amounts may be paid in cash, particularly where services are performed in response to a visit to a Department office.

c. Where the estimated fees to be charged exceed \$50.00, a deposit of 50 percent of the estimated amount shall be collected from the requester before any of the requested materials are reproduced.

d. Where a request for records indicates the necessity of an extensive search that could result in a high search cost, the requester should be notified of that fact and of the possibility of an unproductive search. The notification should offer the requester the opportunity to confer with agency personnel to reform the request to meet the needs at a lower fee. When an extensive search still appears necessary, unless the agency determines that the request is in the public interest in accordance with Section 5a(5), it shall inform the requester that no search will be undertaken until an agreement to pay applicable fees is received, including a deposit of 50 percent of the estimated fee where appropriate.

Sec. 9. Photographic reproduction, microfilm, mosaic and maps. Reproduction of such aerial or other photographic microfilm, mosaic and maps as have been obtained in connection with the authorized work of the Department may be sold at the estimated cost of furnishing such reproductions as prescribed in this schedule.

Sec. 10. Agencies which furnish photographic reproductions. a. Aerial photographic reproductions. The following agencies of the Department furnish aerial photographic reproductions:

#### Agricultural Stabilization and Conservation

Service (ASCS), APFO, USDA-ASCS, 2222

West 2300 South, P.O. Box 30010, Salt Lake

City, Utah 84125.

#### Soil Conservation Service (SCS), USDA,

Cartographic Division, Washington, DC

20250, or Cartographic Facility in nearest

SCS Technical Service Center.

b. Other photographic reproductions. Other types of photographic reproductions may be obtained from the following agencies of the Department:

Agricultural Stabilization and Conservation

Service (ASCS) (Address above).

Forest Service (FS), USDA, P.O. Box 2417,

Washington, DC 20013, or nearest Forest Service Regional Office.

Office of Governmental and Public Affairs,

USDA, Photography Division, Room 4407

South Building, Washington, DC 20250.

Soil Conservation Service, USDA,

Information Division, Audio Visual Branch,

Washington, DC 20250.

National Agricultural Library, USDA, Office

of the Deputy Director, Technical

Information Systems, Room 200, NAL

Building, Beltsville, Md. 20705.

Sec. 11. Circumstances under which photographic reproductions may be provided free. Reproductions may be furnished free at the discretion of the agency, if it determines this action to be in the public interest, to:

a. Press, radio, television, and newsreel representatives for dissemination to the general public.

b. Agencies of State and local governments carrying on a function related to that of the Department when it will help you accomplish an objective of the Department.

c. Cooperators and others furthering agricultural programs. Generally, only one print of each photograph should be provided free.

Sec. 12. Loans. Aerial photographic film negatives or reproductions may not be loaned outside the Federal Government.

Sec. 13. Sales of positive prints under government contracts. The annual contract for furnishing single and double prints to agencies of the Department, County Extension Agents, and others cooperating with the Department, carries a stipulation that the successful bidder must agree to furnish slide film positive prints to such persons, organizations, and associations as may be authorized by the Department to purchase them.

Sec. 14. Procedure for handling orders. In order to expedite handling, all orders should contain adequate identifying information. Agencies furnishing aerial photographic reproductions require that all such orders identify the photographs. Each agency has its own procedure and order forms.

Sec. 15. Reproduction prices. The prices for reproduction listed here are for the most generally requested items.

a. National Agriculture Library. The following prices are applicable to National Agricultural Library items only: Reproduction of electrostatic, microfilm, and microfiche copy--\$3.00 for the first 10 pages or fraction thereof, and \$2.00 for each additional 10 pages or fraction thereof. Duplication of NAL-owned microfilm--\$10.00 per reel. Duplication of NAL-owned microfiche--\$3.00 for the first fiche and \$0.50 for each additional fiche. Magnetic tape containing bibliographic files--\$45 per reel. Charges for manual and automated data base searches for bibliographic or other research information will be made in accordance with Section 4, subsection c-e of this fee schedule. The contract rate charged by the commercial source to the National Agricultural Library, Room 111, Information Access Division, USDA, Beltsville, Maryland 20705 (301-344-3834).

b. General photographic reproductions. Minimum charge \$1 per order. An extra charge may be necessary for excessive laboratory time caused by any special instructions from the purchaser.

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| Class of work and unit | Price |
|------------------------|-------|
|------------------------|-------|

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1. Black and white Line Negatives:

4 by 5 (each)..... \$6.00

8 by 10 (each) ..... 8.50

11 by 14 (each)..... 11.00

2. Black and white Continuous Tone

Negatives:

4 by 5 (each)..... 8.50

8 by 10 (each)..... 11.00

3. Black and White Enlargements:

8 by 10 and smaller (each)..... 6.50

11 by 14 (each)..... 11.00

Larger sizes and quantities.... (1)

4. Black and White Slides:

2x2 cardboard mounted (from  
copy negative) (each)..... 4.00

Blue ozalid slides (each)..... 5.00

5. Color Slides: (2x2 cardboard  
mounted ) Duplicate color slides:

Display quality (each)..... .65

Display color slides are slides  
from 35mm color slides only.)

Repro quality (each)..... (1)

Original color slides (from flat  
copy) (each)..... 6.50

6. Color Enlargements and Trans  
parencies:

4 by 5 and larger..... (1)

7. Slide Sets:

1 to 50 frames..... 14.50

51 to 60 frames..... 16.50

61 to 75 frames..... 18.50

76 to 95 frames..... 21.50

96 to 105 frames..... 23.00

106 to 130 frames..... 26.50

(Prices include printed narra-  
tive guide.)

8. Cassettes: (for the corresponding

slide sets above)..... 3.00

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(1) By quotation.

c. Aerial photographic reproductions. There is no minimum charge on aerial photography orders. The prices for various types of aerial photographic reproductions are set forth below. Size measurements refer to the approximate size in inches of the paper required to produce the print.

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Size Price

each

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1. Black-and-white contact prints:

10x10 Paper..... \$3.00

10x10 Diapositive (film)..... 6.00

10x10 Copy Negative..... 4.00

2. Aerial photo index sheets:

20x24 RC (Resin coated base)

paper..... 5.00

24x36 Ozalid..... 4.00

Microfilm (Photo indexes):

Aperture Cards..... 1.00

Microfiche..... 2.00

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Price each

Size RC Film

paper positive

trans-

parency

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### 3. Black-and-white enlargement

(projection prints):

12x12..... \$6.00 \$12.00

17x17..... 8.00 14.00

24x24..... 12.00 20.00

38x38..... 25.00 35.00

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Price each

RC Color

Size color film

paper positive

trans-

parency

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### 4. Reproductions from

color negatives.

10x10 contact..... \$5.00 \$15.00

12x12 enlargement..... 20.00 .....

20x20 enlargement..... 25.00 .....

24x24 enlargement..... 30.00 .....



38x38 enlargement..... 45.00 .....

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Price each

White

opa- Color

Size que film

base positive

color trans-

print parency

film

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#### 5. Reproductions from color

positive transparencies

(natural color or color

infrared).

10x10 contact..... \$8.00 \$12.00

12x12 enlargement..... 25.00 .....

20x20 enlargement..... 30.00 .....

24x24 enlargement..... 35.00 .....

38x38 enlargement..... 50.00 .....

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6. Special need. For special needs not covered above, persons desiring aerial photographic reproductions should contact the agencies listed in section 10a or the Department aerial photography coordinator, Aerial Photography Field Office, USDA-ASCS, 2222 West 2300 South, P.O. Box 30010, Salt Lake City, Utah 84130.

d. Audio and videotape reproductions. For reproductions of audio or videotapes, requesters must supply their own recording tape, and will be assessed a fee of \$20.00 an hour for copying work

requested. There is a one-hour minimum charge. Payment is required at the time videotapes or audiotapes are accepted by the requester.

(5 U.S.C. 301; 5 U.S.C. 552; 7 U.S.C. 2244; 31 U.S.C. 9701; and 7 CFR 2.75(a)(6)(xiii).)

Dated: September 4, 1986.

Richard E. Lyng,

Secretary of Agriculture.

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